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No. 10-576

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

FIDEICOMISO DE LA TIERRA DEL CAÑO MARTÍN PEÑA,
Petitioner,

v.

LUIS G. FORTUÑO, ANTONIO M. SAGARDÍA-DE JESÚS, MUNICIPALITY OF SAN JUAN, JORGE SANTINI, AUTORIDAD DE ENERGÍA ELÉCTRICA, AUTORIDAD DE CARRETERAS, ADMINISTRACIÓN DE TERRENOS,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

REPLY BRIEF

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INTRODUCTION

Petitioner alleged and argued in the courts below that the Puerto Rican government took Petitioner's land without a legitimate public purpose. The Legislature's stated reasons for the taking are all abandoned or discredited. In litigation, Respondents' counsel concocted a variety of *post hoc* reasons for the taking, some of which Respondents repeat in their opposition. None of the purposes stated by the Legislature or advanced by Respondents in litigation, however, are consistent with Petitioner's allegation that the Mayor of San Juan has publicly announced that he will begin giving Petitioner's land to private parties as soon as possible. Nor have Respondents explained how the abrupt confiscation of the land conveyed to the Fideicomiso after an extensive planning process would serve the purposes of a statute intended "to eliminate conditions harmful to the public." Opp. 22. Petitioner has thus stated a well-pleaded claim of a taking under the mere pretext of a public purpose.

As explained in the Petition, the First Circuit's decision ordering dismissal of Petitioner's takings claim at the pleading stage conflicts with this Court's decision in *Kelo* as well as with the thoughtful decisions of the highest courts of Hawaii and the District of Columbia. The First Circuit's decision also reflects substantial confusion in the lower courts regarding the standard by which claims of pretextual takings are evaluated.

Respondents say nothing to dispel this serious conflict and confusion. Rather, they focus their

opposition on the contention that Petitioner failed to preserve its takings claim or to plead it adequately. That contention lacks merit. The need for this Court's guidance to resolve the conflict created by the First Circuit's decision and to eliminate the confusion surrounding claims of pretextual takings is thus readily apparent.

ARGUMENT

I. The First Circuit's Decision Is Inconsistent With *Kelo* As Well As With Decisions From The Highest Courts Of Hawaii And The District Of Columbia

The First Circuit ordered Petitioner's takings claim dismissed in spite of factual allegations – which are quoted and discussed in detail below, *see infra* pp. 5-9 – indicating that the taking lacked a public purpose and that the stated reasons for the taking were mere pretexts. In so doing, the First Circuit accorded dispositive weight to representations regarding the taking's purpose made by Respondents' counsel for the first time on appeal. Pet. App. 22a-23a. Under the First Circuit's decision, a defendant need only concoct a facially legitimate reason for a taking to defeat a pretext claim – even where, as here, the facts alleged by the plaintiff demonstrate that the taking is motivated by something besides a legitimate public purpose.

That decision cannot be reconciled with this Court's holding in *Kelo v. City of New London*, which made clear that the government may not take property "under the mere pretext of a public purpose." 545 U.S. 469, 478 (2005). Because the

"actual purpose" of a taking must pass scrutiny under the Public Use Clause, the bare fact that the government can present hypothetical public purposes to justify the taking does not authorize dismissal of a well-pleaded claim of pretext. *See Kelo*, 545 U.S. at 478; *City of Cincinnati v. Vester*, 281 U.S. 439, 446 (1930); *see also Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

Respondents mistakenly claim that *Kelo* is inapplicable to this case because the elimination of conditions harmful to the public – which Respondents now embrace as the purpose animating the taking – "was not even present in *Kelo*" and has been previously considered "primarily a valid prerogative of the States." Opp. 28. But nothing in *Kelo* precludes pretext claims where the stated justification for the taking has been previously deemed a 'classic' or well-established public purpose, as the Supreme Court of Hawaii has squarely held: "Plainly it was not the intention . . . of the Supreme Court in *Kelo* to foreclose the possibility of pretext arguments merely because the stated purpose is a 'classic' one." *County of Hawai'i v. C&J Coupe Family Ltd. P'ship*, 198 P.3d 615, 647 (Haw. 2008).

In addition, the "close attention" paid to the facts by the Hawaii Supreme Court in *C&J Coupe* and by the D.C. Court of Appeals in *Franco v. National Capitol Revitalization Corp.*, 930 A.2d 160 (2007), Opp. 31-32, does not resolve the conflict between those decisions and the one below. Indeed, the First Circuit departed from *Kelo* and the rulings of the Hawaii and D.C. courts precisely because – in

reliance on an incorrect interpretation of *Kelo* – it failed to give sufficient weight to the facts alleged by Petitioner in this case. To be sure, a taking "justified in reference to several classic public uses *whose objective basis is not in doubt*" will survive scrutiny under the Public Use Clause so long as it is rational. *See Goldstein v. Pataki*, 516 F.3d 50, 63 (2d Cir. 2008) (emphasis added); Opp. 30. But Petitioner's well-pleaded factual allegations raise significant doubts as to the "objective basis" for the taking of Petitioner's land. Because the First Circuit mistakenly understood *Kelo* to require it to treat the stated reasons for the taking as dispositive of the objective basis for the taking, the decision below conflicts with *Kelo*, *C&J Coupe*, and *Franco*. It is also emblematic of widespread confusion that only this Court can resolve – and, notably, Respondents make no effort to contest the Petition's description of confusion among courts and commentators concerning the correct application of *Kelo* to claims of pretext. *See* Pet. 19-21.

II. Respondents' Effort To Disguise The Conflict Created By The First Circuit's Decision Misreads The Record And Misstates The Law

In an effort to hide the conflict created by the decision below, Respondents assert that Petitioner did not actually plead allegations of pretext or argue pretext before the lower courts. Respondents also invent pleading requirements that they claim Petitioner failed to satisfy: that Petitioner allege that Law 32 abandoned the public purposes of Law 489; and that Petitioner identify the specific private parties the taking of Petitioner's land was intended

to benefit. But as Petitioner has alleged and argued pretext all along, and as neither pleading requirement posited by Respondents actually exists, the split in authority described above is squarely presented for this Court's review.

1. Respondents' contention that Petitioner never actually made any claim of pretext in the courts below is entirely without merit. Respondents concede that Petitioner alleged and argued that the threatened confiscation of Petitioner's property was not for "public use" under the Fifth Amendment's Takings Clause. *See, e.g.*, Opp. 13 ("[P]laintiff framed its public use challenge as follows: 'whether the Government can establish Law 32's compliance with the Fifth Amendment's 'public use' requirement.'"). Respondents likewise admit that the First Circuit addressed the merits of Petitioner's takings claim. *Id.* at 15.

Petitioner's allegations and arguments *specifically* raised the pretext issue. The Complaint alleged that shortly after Petitioner obtained title to approximately 200 acres of land pursuant to Law 489's comprehensive plan to address an environmental and humanitarian disaster, Pet. App. 9a-15a; Am. Comp. ¶¶ 3.1-3.5, the Puerto Rican government – now under the leadership of a different political party – enacted Law 32 in order to confiscate Petitioner's land.[1] Pet. App. 14a; Am.

[1] Notwithstanding Respondents' contrary arguments, the Fideicomiso is a private community land trust and was granted independent juridical personality by Law 489, as alleged in the Complaint. Am. Comp. ¶ 3.1. The First Circuit's decision is based on that premise.

Compl. ¶¶ 4.24-4.26. When the Legislature enacted Law 32, the Complaint explained, the Mayor of San Juan announced his intention to give away the Fideicomiso's land to private parties as soon as possible. Am. Compl. ¶¶ 3.12, 4.35.[2] Petitioner therefore alleged that the taking effected by Law 32 lacked any "discernible plan related to legitimate governmental purposes or public use," *id.* ¶ 1.4, and that Respondents' actions were prohibited by the Constitution's mandate that "takings be for legitimate public purposes, and not for the purpose of conferring a private benefit on particular parties," *id.* ¶ 5.3.

Petitioner preserved these claims of pretext in its arguments to the courts below. For instance, before the First Circuit, Petitioner relied on an extensive analysis of *Kelo* to argue that the taking lacked a legitimate purpose and that Respondents' stated purposes were unworthy of credence. Pet.'s Supp. Br. (Mar. 9, 2010); *accord* Pet. App. 20a ("The Fideicomiso says that the alleged 'taking' under Law 32 is not for 'public use' because it serves no legitimate purpose . . . .").

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[2] Evidence that Mayor Santini had already begun delivering property rightfully owned by the Fideicomiso to private parties forced Petitioner to seek emergency relief from the courts below. Pl.'s Mot. at 8, Civil No. 2009-1581 (D.P.R. June 29, 2009); Fideicomiso Mandamus Br. 2, No. 09-1911 (1st Cir. July 8, 2009); Fideicomiso Mot. at 6-7., No. 09-2569 (1st Cir. Nov. 17, 2009) (presenting evidence that Mayor Santini testified at a government hearing in October 2009 that "it was his intention to deliver 2,000 to 2,500 titles" to the land in question to individuals "starting in December, 2009 and January, 2010").

To claim that Petitioner did not present its pretext claim in the lower courts, Respondents not only disregard Petitioner's filings but also contradict their own briefs. *Compare* Opp. 23 (claiming that Petitioner "did not affirmatively allege that the amendment was, in fact, adopted to benefit a particular class of identifiable individuals" (internal quotation marks omitted)), *with* Municipality Mot. at 32 (D.P.R. July 31, 2009) ("The plaintiff specifically claims that the statute was allegedly passed for the purpose of conferring a private benefit on particular parties . . . .").

Under these circumstances, there can be no question that Petitioner has raised the takings claim presented by the Petition at every stage of this case.[3]

2. Petitioner's factual allegations state a claim of a pretextual taking sufficient to survive a motion to dismiss.

a. In enacting Law 32, the Puerto Rico Legislature set forth two official purposes for the taking of Petitioner's land: harmonizing Law 489 with other laws and clarifying that public domain lands are not transferrable. Pet. App. 23a. In their opposition, Respondents do not contend that either of these stated reasons actually motivated the taking of

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[3] There is no merit to Respondents' argument, Opp. 25-26, that Petitioner waived its right to discovery and trial by urging the Court of Appeals to invalidate the taking on appeal, Pet.'s Supp. Br. 9-10 (Mar. 9, 2010). Rather, Petitioner argued that although the district court's dismissal of the complaint had foreclosed "inquiry into improper motive" through discovery, the "limited factual record" before the Court of Appeals made "evident" the "public use violation." *Id.* at 8.

Petitioner's land. Neither do Respondents claim – as the First Circuit found in reliance on Respondents' representations at argument – that the taking was motivated by a desire to allow "experienced public agencies [to] regain ownership of lands in the canal" so as to "facilitate better and faster completion of projects." Pet. App. 23a. Instead, Respondents now claim that Law 32 and Law 489 were animated by the same (almost unintelligibly broad) purpose: "to eliminate conditions harmful to the public." Opp. 22. In other words, Respondents' current position is that the public purpose of Law 32, which took Petitioner's land, was conclusively established by the statement of motives included in Law 489, which gave Petitioner its land.

These self-serving justifications all suffer from a common flaw: each is inconsistent with Mayor Santini's announced intention to hastily distribute the Fideicomiso's land to private parties. None of the purported public purposes suggested by Respondents are rationally served by that kind of distribution of the Fideicomiso's land. *Cf. Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 422 (1992) (explaining that "exercises of the condemnation power [are] constitutional" so long as the condemning authorities are "rational in their positions that some public purpose [is] served").

Respondents' inability to defend the Legislature's stated reasons for the taking, the multiplicity of *post hoc* justifications offered by Respondents' counsel, and Petitioner's factual allegations all support a plausible inference that the purposes stated by the Legislature for the taking of Petitioner's land are

mere pretext. That the reasons given by the Legislature at the time of the taking and the reasons invented by Respondents' counsel during this litigation are pretextual in turn gives rise to a strong inference that the taking lacked a legitimate public purpose. *See* Pet. 12.

b. Respondents assert that Petitioner's claim must fail because Law 489 had the public purpose of eliminating harmful conditions and Petitioner failed to argue that Law 32 abandoned that public purpose. Opp. 19-22. This contention is deeply flawed.

First, and most importantly, the issue raised by Petitioner's takings claim is not whether Law 32 "abandoned" the purpose of Law 489; rather, it is whether Law 32's taking of Petitioner's property serves a legitimate public purpose. That Law 489 – most of which was unaffected by Law 32 – still serves a public purpose is entirely irrelevant. While Respondents now say that Law 32's confiscation of the Fideicomiso's land was for the purpose of eliminating harmful conditions in the Canal area, they do not even attempt to explain how allowing Mayor Santini apparently unfettered discretion to transfer the Fideicomiso's land to private parties is consistent with that purpose.

In any event, Respondents misread the opinion below. The First Circuit recognized that Petitioner strenuously argued that Law 32's changes to Law 489 were, in fact, inconsistent with the original purposes of Law 489. Indeed, Petitioner alleged that Law 32 "also violates the basic precepts and provisions of the remainder of Law 489." Am.

Compl. ¶ 4.33. The Court of Appeals explained that Petitioner argued that the taking effected by Law 32 "bears no reasonable relationship to any possible legitimate purpose . . . not least because Law 32, in the Fideicomiso's view, relieves public agencies from the obligation to advance the goals of the ENLACE Project identified in Law 489." Pet. App. 21a; *see also* Pet.'s Supp. Br. 5-7 & n.4 (Mar. 9, 2010). Respondents' faulty "abandonment" argument is based on the exact opposite premise: that the Court of Appeals found that Petitioner "was *not* arguing that Law 32 'relieves public agencies from the obligation to advance the goals of the ENLACE Project identified in Law 489.'" Opp. 15 (quoting Pet. App. 21a) (emphasis added); *see also id.* at 20, 21-22.

c. Respondents also contend that Petitioner failed to state a claim because it failed to identify the specific individuals the taking was intended to benefit. Opp. 23-25. But Petitioner did identify the general group of individuals to whom the government planned to make a transfer. While it did not *name* these individuals, this Court's precedent cannot be read to establish such an onerous pleading requirement. In the absence of discovery, only Respondents can know precisely which private parties will benefit from the planned transfer of "the [Fideicomiso's] lands immediately and indiscriminately to private individuals." Opp. 24.

Further, while it is well established that "the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*," *Kelo*, 545 U.S. at 477; *accord id.* at 494 (O'Connor, J., dissenting), this Court has never

suggested that the purpose of benefitting a specific private party through a direct property transfer is the *only* conceivable purpose that does not "pass scrutiny under the Public Use Clause." *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 244 (1984). There can be no doubt, for instance, that a taking could not be justified by the bare desire to exact political revenge or to harm unpopular private property owners. *See Eastern Enterprises v. Apfel*, 524 U.S. 498, 537 (1998); *id.* at 548-49 (Kennedy, J., concurring in judgment and dissenting in part). It is similarly difficult to imagine how a taking for the purpose of rewarding favored public officials with control over valuable property could possibly be classified a "legitimate purpose of government." *Midkiff*, 467 U.S. at 245.

Given that Law 32 was hastily enacted by a newly elected government, each of these impermissible non-public purposes can be plausibly inferred under the facts Petitioner alleged. Ultimately, however, what matters is that Petitioner has stated a claim that the Legislature's purpose in taking the Fideicomiso's property was not a legitimate public one. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1015 n.18 (1984).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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